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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-768

SCOTT BURGWIN, BENJAMIN RICHMOND, CARLO J. SPOSITO, JR., LILLIAN STEVENS and MELODY ANN WHITLEY

Petitioners,

v.

JULIUS J. MATTSON, EDWIN BRADBURY, V. ALLEN GOGH, PHILLIP MILLER, STANLEY RENNING, and RICHARD F. ROBERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1975

No. _____

SCOTT BURGWIN, BENJAMIN RICHMOND, CARLO J. SPOSITO, JR., LILLIAN STEVENS and MELODY ANN WHITLEY,

Petitioners,

v.

JULIUS J. MATTSON, EDWIN BRADBURY, V. ALLEN GOGH, PHILLIP MILLER, STANLEY RENNING, and RICHARD F. ROBERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed September 2, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, dated September 2, 1975, is unreported, and is set out in the Appendix, infra, p. A1.

The opinion of the District Court dated November 1, 1975, is unreported, and is set out in the Appendix, infra, p. A4.

JURISDICTION

The judgment of the Court of Appeals was entered in this case on September 2, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is it proper, in a civil rights case brought against federal law enforcement officers for violations of constitutuional rights, where the controlling issue is the defendants' good faith and reasonable belief in the legality of their actions, to grant summary judgment in favor of the defendants based solely

upon the defendants' statements in affidavits that they had acted in good faith and with reasonable belief?

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2101 provides in part:

"(a)(1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce . . . with intent --

(A) to incite a riot; or
(B) to organize, promote, encourage, participate in, or carry on a riot; or

* * * * *

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot

and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C) or (D) of this paragraph --

Shall be fined not more than $10,000 or imprisoned not more than five years or both."

STATEMENT OF THE CASE

(1) Statement of Facts

In February 1973, a large number of individuals, including members of the American Indian Movement, forcibly occupied Wounded Knee, South Dakota. A blockade was established at a 12-mile perimeter of the area by United States Marshals and others. This occupation and blockade were in existence at all times material to this lawsuit.

On March 23, 1973, plaintiff Carlo J. Sposito, Jr., rented a U-Haul truck in Portland, Oregon, and together with the other plaintiffs, accepted various items of food and clothing donated by persons in Portland and Eugene, Oregon, for the purpose of transporting them to South Dakota as a tangible and symbolic expression of sympathy and concern for the social, political, and economic conditions confronting the Lakota Nation and other American Indians.

At 11:30 a.m., March 23, 1973, the Assistant Special Agent in Charge of

the Portland FBI Office, Lee Colwell, was told by an informant that plaintiffs Scott Burgwin, Benjamin Richmond, and Melody Whitley intended to take food, clothing, and medicine to Wounded Knee. Mr. Colwell immediately ordered FBI agents to establish a surveillance, and at about 3:20 p.m. on March 23, FBI agents in Portland sighted the U-Haul truck that had been rented earlier in the day by plaintiff Sposito. At all times thereafter, plaintiffs and the truck were under constant and continual surveillance by some or all of the defendants. They saw food, water, and sleeping gear being loaded in the truck in Portland, and when the truck left Portland for Eugene at about 6 p.m., defendants followed.

Plaintiffs reached Eugene at about 10 p.m., and drove to a building that had been established as a headquarters for persons wishing to donate food, clothing, and blankets for the Indians in South Dakota. There they loaded the truck with such supplies, and left at about 10:40 p.m., heading east from Eugene on State Highway 126. Defendants followed them.

Shortly after midnight, on March 24, 1973, the truck broke down near Sisters, Oregon, and the next morning, at about 10 a.m. on March 24, the truck was towed to a service station in Blue River, Oregon, where repairs were made. After the truck departed, the owner of the service station told defendants that he had observed food and bedding in the truck and that one of the occupants had told him that their destination was Rapid City, South Dakota.

When the First Assistant U. S. Attorney, Jack Collins, was advised of plaintiffs' expressed intention to go to Rapid City, he authorized defendants to arrest them for violating 18 USC §2101, by travelling in interstate commerce "with intent to promote, encourage, participate and carry on a riot at Wounded Knee, South Dakota" (in the words of the complaint filed two days later). The arrests were made at about 3:45 p.m. in Bend, Oregon. Plaintiff Burgwin was searched and handcuffed, and all the plaintiffs were questioned. The truck was searched without plaintiffs' permission by defendant Renning, who stated in his affidavit that he found food,

clothing, toilet tissue, and a pamphlet stating that a group with which some of the plaintiffs were associated intended to "provide general humanitarian service by transporting food and clothing to Rapid City, South Dakota, from collection points in Oregon and along the route of travel, to the American Indian Movement at Rapid City for distribution."

After the arrest and search, defendants transported plaintiffs from Bend to Portland, and they were booked into the Multnomah County Jail just before 10 p.m. on March 24, 1973. The U. S. Attorney, Sidney I. Lezak, who was out of town at the time, had learned of the arrests at about 9 p.m. in a telephone call from Mrs. Lillian Stevens, the mother of plaintiff Lillian Stevens. Mrs. Stevens told him that the plaintiffs were "primarily Quakers, religiously motivated idealists who had no serious criminal records and no intention of engaging in violent confrontation." Mr. Lezak then telephoned Mr. Collins and instructed him to arrange for plaintiffs to be released on their own recognizance. Mr. Collins telephoned the United States

Magistrate at 10 p.m., made the necessary arrangements, and plaintiffs were released before 11 p.m. on March 24, 1973.

On March 26, 1973, plaintiffs were formally charged with a violation of 18 USC §2101 in a criminal complaint signed by defendant Robert. On March 27, 1973, the United States Attorney filed a motion to dismiss the complaint, on the ground that "further review [had] revealed matters relating to defendants' [the present plaintiffs] specific intent which makes dismissal of this complaint in the best interests of justice." An order of dismissal was signed by the Magistrate the same day.

(2) Proceedings in the Courts Below

Plaintiffs brought this action under the First, Fourth, and Fifth Amendments to the United States Constitution, under 42 USC §1985, and under the pendent claim jurisdiction of the lower court, against Julius L. Mattson, special agent in charge of the Portland, Oregon office of the Federal Bureau of Investigation, and against the five FBI agents who arrested them. In essence the complaint alleged that as a result

of the combined acts of the defendants acting jointly and in concert with others, plaintiffs were illegally arrested and their property illegally searched and seized, and that their rights of free speech, freedom of travel, and freedom from unreasonable arrest, search, and seizure were violated by defendants.

Plaintiffs filed their complaint on April 16, 1973. On June 26, 1973, defendants filed a motion for an order dismissing the complaint or in the alternative for summary judgment. In support of that motion, defendants' counsel submitted affidavits of U. S. Attorney Lezak; First Assistant U. S. Attorney Collins; Lee Colwell, Assistant Special Agent in Charge of the FBI office in Portland; and each of the named defendants. These affidavits set out the facts surrounding the surveillance and arrest of plaintiffs, and each affidavit filed by the defendants contained a statement that the defendant acted in good faith and within the scope of the directions given him by his superior officers.

Plaintiffs filed no affidavits in opposition to defendants affidavits,

believing that the issue of defendants' good faith and reasonable belief in the validity of their actions in carrying out the arrests, search, seizure, and related activities could be resolved only by a trial and not by a "war of affidavits." During oral argument on the motion on September 12, 1973, counsel for plaintiffs made it very clear that they wanted to have the opportunity to depose the defendants, and asserted their view that the defendants' own affidavits raised triable issues with respect to the defendants' motive and intent in carrying out their acts. Plaintiffs had already filed a request for production of documents, but defendants failed to comply with it; instead, they filed a motion for an extension of time in which to make their response, reciting that the "pendency" of their motion to dismiss made plaintiffs' request "premature and unnecessarily burdensome."

On the basis of the defendants' affidavits, the District Court granted their motion for summary judgment, based on its conclusion that:

> "*** [T]here were ample grounds for the arrests of the plaintiffs without a warrant. In my view, the defendants, all of whom are agents of the FBI, were acting in good faith within the scope of their official duties and have official immunity for all their acts." (App., infra, pp. A14.)

Plaintiffs appealed to the Court of Appeals for the Ninth Circuit, which affirmed the District Court's judgment on the ground that plaintiffs had raised no triable dispute.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and with decisions from other Circuits regarding the appropriate standards for granting summary judgment when motive and intent are in issue. If followed, the decision will eviscerate the decision of this Court recognizing a damage remedy for violation of constitutional rights by federal law enforcement officers.

1. Federal law enforcement officers have a qualifed immunity from damage suits for violation of consititutional rights based on "good faith" and "reasonable belief" in the lawfulness of their acts.

In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), this Court held that private citizens have a right of action for damages against federal law enforcement officials for violation of the Fourth Amendment guarantee against unreasonable searches and seizures. Since then, the lower courts have consistently held that federal law enforcement police have no immunity to protect them from damage suits charging violations of constitutional rights, but that it is a valid defense to such charges to allege and prove that the federal officer acted in good faith and with a reasonable

belief in the lawfulness of his actions. Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 456 F.2d 1339, 1341 (2d Cir. 1972). Accord, Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972); Apton v. Wilson, 506 F.2d 83, 91-93 (D.C. Cir. 1974); Zweibon v. Mitchell, 516 F.2d 594, 671 (D.C. Cir. 1975); Balistrieri v. Holtzman, 55 F.R.D. 470 (E.D. Wis. 1972); Nickerson v. Gilbert, 66 F.R.D. 593 (D. R.I. 1975). These holdings are consistent with the standards for qualified immunity established for other public officials in Scheuer v. Rhodes, 416 U.S. 232 (1974) and Wood v. Strickland, 95 S. Ct. 992 (1975).

In order to grant summary judgment for the defendants here, therefore, the District Court had to find, and did find, that there was no genuine dispute as to material fact on the issue of the defendants' reasonable belief and good faith. In so holding, the District Court applied an erroneous standard for determining the existence of a triable issue of fact, and in affirming, the Court of Appeals applied the same erroneous standard and established a conflict with decisions in other circuits.

2. Summary judgment is improper when "good faith" and "reasonable belief" are at issue and when conflicting inferences may be drawn from the evidence.

The rules governing motions for summary judgment are well established, and have been recently stated as follows:

> "*** The movant *** must carry the burden of demonstrating the absence of any genuine issue of material fact, and the party opposing the motion is entitled to all favorable inferences deducible from the parties' evidentiary representations. The court's function is not to resolve any such issue, but only to ascertain whether any exists, and all doubts in that regard must be resolved against summary judgment." Bouchard v. Washington, 514 F.2d 824, 827 (D.C. Cir. 1975) (footnotes omitted).

Beyond these basic principles, it has been the rule at least since Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962), that "*** summary procedures should be used sparingly *** where motive and intent play leading roles ***." 368 U.S. at 473. Poller was an antitrust case, but the principle has been applied in a variety of contexts, including civil rights cases.

In Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975), for example,

the court reversed a summary judgment that had been entered for the defendants in an employment discrimination suit brought against officials of the Veterans Administration, ruling that the "live testimony" of the defendants

> "*** might have substantially illuminated their actual motivations in not promoting appellant, and it is clear that summary judgment is particularly inappropriate where credibility is an integral component of a material factual conflict." 520 F.2d at 159 (footnote omitted).

Similar decisions from other circuits holding summary judgment improper when issues involving good faith, motive, state of mind, and intent are in dispute include Tankersley v. Albright, 514 F.2d 956, 963 (7th Cir. 1975); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973); Ross v. John's Bargain Stores Corp., 464 F.2d 111 (5th Cir. 1972); and Hines v. Local Union No. 377, 506 F.2d 1153, 1157 (6th Cir. 1974).

In this case, plaintiffs alleged, inter alia, that defendants' actions were "unlawful," that they acted "without reasonable grounds or probable cause to believe" that plaintiffs had

committed a crime, and that they "willfully injured, intimidated and interfered with" plaintiffs, and defendants' affidavits were replete with facts from which inferences could be drawn supporting these allegations. They showed that the FBI in Portland began its surveillance of defendants during the early afternoon of Friday, March 23, 1973. At all times after that, defendants were aware of nearly every move that plaintiffs made. In Eugene, they saw boxes, paper bags, blankets, and duffel-type bags being loaded into plaintiffs' truck. After the truck broke down between Eugene and Bend, the defendants were told that the truck contained "food, clothing, and blankets," and they learned that plaintiffs' destination was Rapid City, South Dakota. There were no weapons in the truck, and defendants do not assert that they had any evidence that there were; indeed, defendant Mattson stated in his affidavit that he had been informed at 6:30 p.m. on March 23 "that firearms and ammunition were not known to be included in the supplies to be transported."

There is nothing in the affidavits of any of the defendants to

suggest that any of them had any personal knowledge of any intent on the part of plaintiffs to violate any federal law, to participate in a riot, or to aid and abet others to participate in a riot, and there is not the slightest indication that any of the defendants had reason to believe that plaintiffs intended to break through what U. S. Attorney Lezak described as "the Federal blockade around Wounded Knee." In fact, Mr. Lezak stated in his affidavit that he knew one of the plaintiffs, Benjamin Richmond, to have participated in previous "arrangements with local law enforcement officers for the conduct of demonstrations in a manner to avoid violent confrontation." Apparently this was the extent of the defendants' knowledge, and that of their superiors, as to the character and motivation of the plaintiffs.

A further question relating to the good faith and reasonable belief issue is raised by Mr. Lezak's statement that "the evidence of [plaintiffs'] intent" to break the law "was in question." Indeed, Mr. Lezak's first reaction when he learned of the plaintiffs' arrest was to arrange for their release on their own

recognizance. When he returned to Portland, he filed a motion for an order dismissing the criminal complaint against plaintiffs, reciting that "further review [had] revealed matters relating to defendants' [the present plaintiffs] specific intent which makes dismissal of this complaint in the best interests of justice." His haste in moving to dismiss the complaint certainly raises an "inference" that he may have believed that the arrests were ill-advised and unwarranted - in other words, that the defendants acted "unreasonably" in arresting the plaintiffs.

Furthermore, defendants' failure even to attempt to obtain a warrant suggests the possibility that they knew they did not have probable cause to arrest the plaintiffs. First Assistant U. S. Attorney Collins stated that there had not been "sufficient time" to present the matter to the Magistrate prior to the arrests, yet Collins himself had become aware of the situation during the morning of March 23, and the FBI had the plaintiffs under continual surveillance for over 24 hours prior to their arrest. Moreover, it

apparently was not at all difficult to get in touch with the Magistrate at a rather inconvenient time of day and on very short notice, for Collins was able to reach him by telephone at his home at 10:00 p.m. on Saturday, March 24, in order to arrange for the release of plaintiffs on their own recognizance, within an hour after the U. S. Attorney had instructed him to do so.

Finally, the very directive from FBI headquarters received by defendant Mattson with regard to "subversive elements" who might be on their way to Wounded Knee revealed the possibility that the defendants had the motive and purpose to stop plaintiffs even without a "reasonable belief" in the validity of their arrest. That directive stated, inter alia, "In those instances where probable cause cannot be established ***, other action must be considered to try to prevent these groups from traveling interstate to Wounded Knee." (Emphasis added.) Surely it would be possible for a jury to infer from this letter that the FBI agents who were instructed to "try to prevent" interstate travel even in the

absence of "probable cause" to arrest the travelers might have carried out those instructions without having a "reasonable belief" in the validity of the arrests.

Where more than one inference can reasonably be drawn from the evidence, summary judgment is improper, particularly where such matters as motive and intent are in issue, "*** since much depends upon the credibility of witnesses testifying as to their own states of mind, and assessing credibility is a delicate matter best left to the fact finder." In re Yarn Processing Patent Validity Litigation, 498 F.2d 271, 288 (5th Cir. 1974). In such a situation, even more than most, affidavits provide "the least trustworthy basis" for a summary judgment, "since the affiant has not been subject to cross-examination and his demeanor is not observable." 6 Moore's Federal Practice ¶56.15[8], p. 2439; see Waldie v. Schlesinger, 509 F.2d 508, 510 (D.C. Cir. 1974).

Here, it was clearly possible to infer from the evidence in the record that the defendants did not have a "reasonable belief" that plaintiffs were on

their way to Wounded Knee with the specific intent to "promote, encourage, participate in and carry on a riot" (in the words of the government's complaint) and that they did not act in "good faith" in arresting and searching their truck, transporting them over 150 miles from Bend to Portland, and incarcerating them in the Multnomah County Jail. Of course defendants' affidavits contained the conclusory and self-serving assertions that they acted reasonably and in good faith; it would have been surprising if they had contained anything else. The point is, however, that the historical facts as alleged in plaintiffs' complaint were substantially admitted by the defendants. Because of that, and because the issues in dispute concerned defendants' state of mind, the filing of affidavits by plaintiffs would have been a meaningless act. Since plaintiffs' allegations were not frivolous or lacking in substantial (and admitted) factual support, entry of summary judgment was improper. See West v. Wheatley, 313 F. Supp. 656 (D. Del. 1970), a civil rights case in which "reasonable belief" was an essential issue, where the court stated:

> "*** While the basic facts are not in dispute, the parties sharply disagree as to the inferences to be drawn from these facts. Where the general facts of a situation, although not in dispute, reveal aspects from which inconsistent hypotheses might reasonably be drawn and as to which the minds of reasonable men might differ, the case should not be determined by summary judgment. The drawing of inferences from, and the acceptance of hypotheses arising out of, a given factual situation are ordinarily the responsibility of the finder of facts." 313 F. Supp. at 659.

See also Nickerson v. Gilbert, 66 F.R.D. 593 (D. R.I. 1975), an action against IRS agents for violation of plaintiff's Fourth Amendment rights, in which the court denied defendants' motion for summary judgment because of the existence of a genuine dispute as to whether the defendants "acted in good faith and with a reasonable belief in the propriety of their actions." 66 F.R.D. at 197-98.

In summary, the decision below is squarely contrary to decisions from other circuits which have held summary judgment inappropriate where issues such as "good faith" and "reasonable belief" are critical to a determination of the

case. Since the Court of Appeals "*** as the reviewing tribunal must give to the parties against whom the summary judgment was entered the most favorable view of the record," Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1262 (D.C. Cir. 1972), it should have reversed the judgment of the District Court and remanded the case for a trial of the facts. The case is a significant one, and deserves review by this Court, for the decision below undermines the availability of the remedy recognized by this Court in Bivens for violations of constitutional rights by federal officers.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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November 24, 1975

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCOTT BURGWIN, BENJAMIN RICHMOND, CARLO J. SPOSITO, JR., LILLIAN STEVENS and MELODY ANN WHITLEY,

Plaintiffs-Appellants,

vs.

JULIUS J. MATTSON, EDWIN BRADBURY, V. ALLEN GOGH, PHILLIP MILLER, STANLEY RENNING and RICHARD F. ROBERT,

Defendants-Appellees.

No. 73-3578

OPINION

[September 2, 1975]

On Appeal from the United States District Court for the District of Oregon

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Before: MERRILL and TRASK, Circuit Judges, and LUCAS,* District Judge

MERRILL, Circuit Judge:

On March 24, 1973, appellants were arrested by agents of the FBI in Bend, Oregon, for violation of 18 U.S.C. §2101 by allegedly travelling in interstate commerce for the purpose of aiding and supporting an uprising against federal authorities by the American Indian Movement in Wounded Knee, South Dakota. They were, at the time of arrest, travelling east, in possession of a truck filled with food, blankets and other life-support materials and they were charged with an intent to transport these materials to Wounded Knee for the benefit of those engaged in the uprising.

---

*Honorable Malcolm M. Lucas, United States District Judge for the Central District of California, sitting by designation.

Following their arrest appellants were taken to Portland, where they were released on their own recognizance. Two days later a formal complaint against them was filed by one of the FBI agents charging violation of §2101. The following day the complaint was dismissed on motion of the United States Attorney for the District of Oregon, "in the best interests of justice." Three weeks later this action was brought by appellants against the FBI agents involved in the arrest, charging a conspiracy to deprive appellants of their civil rights of expression, travel and freedom from unreasonable arrest, search and seizure.

In due course appellees moved for summary judgment, supporting their motion by affidavits justifying their arrest of appellants. Appellants filed a memorandum in opposition, but it was unsupported by any affidavits or evidentiary material.

The district court, following hearing, concluded from the record before it that probable cause to arrest appellants had been established. Further, the court concluded that in making the arrests appellees were acting within the scope of their authority and reasonably believed in good faith that the arrest was lawful; and that consequently appellees were immune from liability.[1]

We agree with the conclusions of the district court.

Appellants argue that summary judgment was premature; that issues remained to be tried as to probable cause and good faith and that it cannot be said that these matters had been established as matter of law.

The district court, in granting summary judgment, noted:

> "Defendants have filed numerous affidavits which set out in full detail the information which they received, the steps which they took and the care which they exercised before they arrested the plaintiffs.
>
> Plaintiffs failed to file any response even though they had ample time before the hearing within which to take advan-

---

[1]This is the test proposed in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). The United States contends for a broader immunity under *Barr v. Matteo*, 360 U.S. 564 (1959) (opinion of Harlan, J.). There is no need here for us to resolve this difference. The parties are otherwise in agreement that the *Bivens* standards are appropriate here.

tage of the discovery procedures which the Federal Rules of Civil Procedure permit."

The affidavits on behalf of appellees alleged facts which, if accepted, would entitle appellees to summary judgment. No effort whatsoever was made by appellants to show that a triable dispute existed as to those facts; that appellants had evidence to the contrary; or that there were other facts which, if considered by a jury, might support findings of lack of good faith. (We note that the conclusions reached by appellees as to the purpose of the truckload of life-support materials were far from unreasonable. If other more rational explanations existed, or should have occurred to appellees, appellants did not at the time of hearing inform the court as to what they were.)

The fact that the issue of good faith is largely involved with facts peculiarly within the knowledge of appellees is no justification for appellants' failure to respond to appellees' moving documents.[2] As the district judge noted, appellants had ample opportunity to take depositions of appellees. Further, at no point did they seek postponement of summary judgment proceedings in order to pursue discovery. Nor did they assert insufficient opportunity or ability effectively to raise disputes.

The failure of appellants to respond, then, left the affidavits of appellees without substantial dispute. The fact that the complaint against appellants had been dismissed "in the best interests of justice" did not serve to provide some innocent explanation for the trip, or to place in question appellees' reasonable belief, in good faith, in the lawfulness of their conduct.

Judgment affirmed.

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[2]*Consolidated Electric Co. v. United States* ex rel. *Gough Industries, Inc.*, 355 F.2d 437 (9th Cir. 1966), and *United States v. Perry*, 431 F.2d 1020 (9th Cir. 1970), are distinguishable on their facts.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SCOTT BURGWIN, BENJAMIN RICHMOND, CARLO J. SPOSITO, JR., LILLIAN STEVENS and MELODY ANN WHITLEY,	)	Civil No. 73-280
Plaintiffs,	)	OPINION
vs.	)	
JULIUS L. MATTSON, EDWIN BRADBERRY, V. ALLEN GOUGH, PHILIP MILLER, STANLEY RENNING and RICHARD F. ROBERT,	)	
Defendants.	)	

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SOLOMON, Judge:

This case is before the Court on defendants' motion to dismiss, or in the alternative, on defendants' motion for summary judgment.

Plaintiffs alleged in their complaint that on Friday, March 23, 1973, at Portland, Oregon, plaintiff Carlo J. Sposito, Jr., rented a U-Haul truck. Plaintiff Sposito and the other plaintiffs, Scott Burgwin, Benjamin Richmond, Lillian Stevens, and Melody Ann Whitely, loaded donated food and clothing on the truck to take it to South Dakota to give the food and clothing to the American Indians as a symbol of their solidarity with the Indians. On the way to Eugene, Oregon, to pick up more donations, plaintiffs were stopped by the Oregon State Police for speeding and they were issued a citation. After loading donations at a building in Eugene, plaintiffs drove toward Bend, Oregon, on Highway 126. On Saturday, March 24, 1973, near Bend, agents of the Federal Bureau of Investigation together with Oregon State Police

officers arrested plaintiffs for violation 18 U.S.C. §2101.[1/] After the arrests, agents searched the U-Haul truck. The

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1/ 18 U.S.C. §2101 provides in part:

> (a)(1) Whoever travels in interstate or foreign commerce or uses any facility of interestate or foreign commerce . . . with intent --
>
> (A) to incite a riot; or
> (B) to organize, promote, encourage, participate in, or carry on a riot; or
>
> * * * * *
>
> (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot
>
> and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C) or (D) of this paragraph --
>
> Shall be fined not more than $10,000 or imprisoned not more than five years or both.

agents then brought plaintiffs back to Portland, Oregon, where they were put in the Rocky Butte Jail. A short time later they were released on their own recognizance. On Monday, March 26, 1973, one of the defendants, an FBI agent, signed a criminal complaint against plaintiffs for violating 18 U.S.C. §2101. On Tuesday, March 27, 1973, on motion of the United States Attorney, the criminal complaint against plaintiffs was dismissed.

Plaintiffs assert numerous violations of the law by the defendants, all of whom are agents of the Federal Bureau of Investigation. Plaintiffs allege that the defendants entered into a conspiracy with members of the Oregon State Police to prevent plaintiffs from exercising their right of interstate travel by arresting and charging plaintiffs with a violation of 18 U.S.C. §2101. They allege that the defendants conspired to get the Oregon State Police officers to stop plaintiffs on their way to Eugene so that they could search the truck and get plaintiffs to make admissions without informing plaintiffs that this was

the purpose of the stop. Plaintiffs also alleged that the defendants violated their constitutional rights by arresting and searching them without either a warrant or probable cause and that 18 U.S.C. §2101 is unconstitutional.

Plaintiffs contend that the defendants violated plaintiffs' rights under 28 U.S.C. §245 and 42 U.S.C. §1985(3). Plaintiffs also contend that the defendants conspired to deny American Indians peaceful encouragement and aid by denying plaintiffs their rights of free expression and association and by failing to give plaintiffs equal protection of the law or equal privileges and immunities under the laws.

Plaintiffs also assert pendant jurisdiction for state common law acts of false arrest, conversion, and malicious prosecution.

Defendants are Julius L. Mattson, Special Agent in Charge of the Portland Office of the FBI, Richard F. Robert, Phillip Miller, Edwin Bradberry, V. Alan Gough, Stanley Renning, all Special Agents in the Portland office of the FBI. They filed a joint motion to

dismiss or, in the alternative, a motion for summary judgment in which they assert:

First, probable cause for the arrests of plaintiffs;

Second, official immunity because all their acts were within the scope of their employment.

In support of their motion, each defendant has filed an affidavit in which he has set forth the details of his activities. Lee Colwell, Assistant Special Agent in Charge of the Portland Office of the FBI, submitted an affidavit showing his part in the actions. Together the affidavits show the nature of the surveillance and the acts preceding and surrounding the arrests. Sidney I. Lezak, U.S. Attorney for the District of Oregon, and Jack G. Collins, First Assistant U.S. Attorney for the District of Oregon, filed affidavits in which they set forth detailed statements of the information which they received and turned over to the FBI agents and the advice they gave the agents.

These affidavits show:

(1) The FBI agents were operating under a Directive of the Department of

Justice which stated that arrests of groups suspected of bringing aid to rioters in Wounded Knee were to be carried out only if probable cause existed, and absent probable cause the suspected groups were to be kept under 24 hour surveillance.

(2) They were receiving reports that groups from a number of places throughout the United States were bringing ammunition and supplies to the rioters in Wounded Knee.

(3) The Oregon State Police received information which they relayed to the FBI that plaintiffs Scott Burgwin, Ben Richmond and Melody Ann Whitley were the people in Portland, Oregon, planning to take supplies to Wounded Knee.

(4) At the time of plaintiffs' trip, the American Indian Movement (A.I.M.) was engaged in a riot at Wounded Knee.

(5) The Vision Works, a building in Eugene, Oregon, where plaintiffs loaded items on the truck, had numerous posters on its walls and windows saying it was the deposit point for Wounded Knee donations.

(6) During their surveliance in Eugene, they saw plaintiffs talking to a person who was known to have delivered ammunition to Wounded Knee.

(7) When plaintiffs were questioned about their destination by the Oregon State Police officer who issued the speeding citation and by the Oregon State Highway Division employees who tried to help plaintiffs repair the truck, plaintiffs said their destination was Salt Lake City, Utah.

(8) The U-Haul agreement completed by plaintiff Sposito gave the destination as Rapid City, South Dakota.

(9) Rapid City is approximately 50 miles from Wounded Knee.

(10) During the repair of the truck at Blue River, Oregon, one of the plaintiffs told the service station repairman that her party was headed for Rapid City, South Dakota.

In my view these affidavits from every defendant and from both the United States Attorney and the Chief Assistant United States Attorney show that there was probable cause for the arrest of the plaintiffs for violating 18 U.S.C. §2101

and that all of the defendants were acting within the scope of their duties and they are immune from liability.

Plaintiffs assert that even though they have not filed any affidavits or other denials of the sworn statements made by the defendants in support of defendants' motions, that they are entitled to have a trial on the merits based upon the allegations in the complaint.

I disagree.

The complaint is filled with conclusionary statements charging defendants with many improper and illegal acts.

Defendants have filed numerous affidavits which set out in full detail the information which they received, the steps which they took and the care which they exercised before they arrested the plaintiffs.

Plaintiffs failed to file any response even though they had ample time before the hearing within which to take advantage of the discovery procedures which the Federal Rules of Civil Procedure permit.

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The excellent statement of Judge John Kilkenny in United States v. Gossett, 416 F.2d 565 (9th Cir. 1969) is applicable here:

> No longer may a defendant, under Federal practice, play a game of hide and seek, refuse to show his hand, and thus place on the trial court and the opposing party, the unnecessary burden of facing a long, arduous and expensive trial. supra at 568.

I know that both the plaintiffs and the defendants are represented by able counsel. If plaintiffs appeal, I am sure that they can set out the cases which they believe show that they are entitled to a hearing even though they did not comply with Fed. R. Civ. P. 56(e)

and even though I found that there were ample grounds for the arrest of the plaintiffs without a warrant. In my view, the defendants, all of whom are agents of the FBI, were acting in good faith within the scope of their official duties and have official immunity for all their acts.

This is not a proper case to determine the constitutionality of the Riot Act, 18 U.S.C. §2101. Law enforcement officers need not be constitutional lawyers and they "should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties - suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." Barr v. Matteo, 360 U.S. 564 (1959), 571.

Defendants' motion for summary judgment is granted.

Dated this 1st day of November, 1973.

/s/ Gus J. Solomon
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-768

SCOTT BURGWIN, ET AL., PETITIONERS

v.

JULIUS J. MATTSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On March 24, 1973, respondents, special agents of the Federal Bureau of Investigation, arrested petitioners for allegedly violating 18 U.S.C. 2101 by transporting food and supplies with the intention of taking them to Wounded Knee, South Dakota, for the purpose of assisting members of the American Indian Movement who were forcibly occupying that area. Following their arrests, petitioners were released on their own recognizance. On March 26, 1973, the government filed a complaint charging petitioners with violating 18 U.S.C. 2101. The complaint was dismissed the following day (Pet. App. A1-A2, A7).

In April 1973, petitioners commenced this action for money damages, alleging that respondents had violated their constitutional rights by the arrest. On June 26, 1973, respondents moved for dismissal of the complaint or, in the alternative, summary judgment. The motion was supported by respondents' affidavits and by affidavits of the

United States Attorney for the District of Oregon and his First Assistant, which set out the facts surrounding petitioners' arrest and the information upon which the decision to arrest had been based.

On August 8, 1973, petitioners filed an opposition to respondents' motion but failed to support it by affidavits or any other evidentiary material. Petitioners made no attempt to depose respondents or to seek discovery prior to September 12, 1973, when the court heard argument on the motion.

On November 1, 1973, the district court granted respondents' motion for summary judgment. The court found that there had been probable cause for the arrest and that defendants had acted in good faith within the scope of their official duties. The court specifically noted that although plaintiffs had had ample opportunity to respond to defendants' motion for summary judgment and to seek discovery prior to the hearing, they had failed to do so (Pet. App. A12-A14).

The court of appeals affirmed on the ground that respondents' affidavits presented facts that on their face entitled them to summary judgment and petitioners had not demonstrated "that a triable dispute existed as to those facts" (Pet. App. A3).

The judgment of the court of appeals is correct and presents no issue warranting further review. Respondents' detailed affidavits indicated the basis for the arrests. Petitioners offered no facts to contradict the affidavits or to draw into question respondents' assertions of good faith.

In the face of respondents' motion and affidavits, petitioners were not entitled to rely on the conclusory allegations of their complaint. Rule 56(e), Fed. R. Civ. P., provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.